

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HANIF BHWIYAN</b>	:	DETERMINATION
	:	DTA NO. 818544
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period	:	
August 11, 1999.	:	

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Petitioner, Hanif Bhwiyan, 10 Avenue D, Apt. 5H, New York, New York 10009, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period August 11, 1999.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on February 12, 2003 at 9:15 A.M., which date began the three-month period for the issuance of this determination. Petitioner Hanif Bhwiyan appeared *pro se*. The Division of Taxation appeared by Barbara G. Billett, Esq. (Mary E. Fontaine).

***ISSUE***

Whether petitioner was a person in possession or control of 45.9 cartons of unstamped or unlawfully stamped cigarettes and, therefore, liable for a penalty pursuant to Tax Law § 481 (former [1][b]).

***FINDINGS OF FACT***

1. On August 11, 1999, investigators from the Division of Taxation conducted an inspection of Purnnima Food Corp., located at 487 Myrtle Avenue, Brooklyn, New York. The investigators discovered numerous packs of unstamped and Virginia tax-stamped cigarettes in the counter area and in an overhead rack. In addition, one-half case of cigarettes bearing Virginia State tax stamps was discovered in a storage area in the rear of the store.

2. During the investigation at the store, the investigators came upon petitioner, who was standing in the front of the store to the side of the counter. The owner of the store was not present, but there was an employee in the rear of the store. When asked for his name, petitioner gave it to the investigators, but he could not produce any identification. The investigators placed him under arrest and delivered him to the New York City Police Department, where petitioner was processed as a “John Doe” and incarcerated until the next day. The Division of Taxation filed a misdemeanor complaint against petitioner based upon its investigation.

3. On December 16, 1999, the criminal matter against petitioner originating from the tax investigation was adjourned in contemplation of dismissal in Brooklyn Criminal Court.

4. Petitioner made no statements to the investigators with regard to the origin of the cigarettes in issue or his employment status with the store, no doubt hindered by petitioner’s limited facility with the English language and the New York Tax Law.

5. Petitioner conceded that he had an ongoing relationship with the owner of Purnnima Food Corp., Mohammed Bhwiyan, but the nature of the relationship was not disclosed.

6. The Division of Taxation issued to petitioner a Notice of Determination, dated March 23, 2000, which set forth the penalty asserted pursuant to Tax Law § 481(former [1][b]) in the sum of \$3,500.00. The notice stated the following:

During an inspection of your premises, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.  
Therefore, penalty is imposed under Article 20 of the New York State Tax Law.

### ***SUMMARY OF THE PARTIES' POSITIONS***

7. The Division of Taxation contends that petitioner was operating Purnnima Food store at the time of the investigation and, therefore, was in possession of 45.9 cartons of unstamped and Virginia tax-stamped cigarettes and is liable for the penalty set forth in Tax Law § 481(former [1][b]). The Division of Taxation notes that the criminal case, although adjourned in contemplation of dismissal, is indicative of petitioner's plea of guilty.

The Division of Taxation relies solely on the Tax Enforcement Referral Report, dated August 12, 1999 and the update thereto, dated January 9, 2003. None of the investigators testified and no corporate documents or tax returns of Purnnima Food Corp. were introduced. In addition, none of petitioner's personal returns were introduced.

8. Petitioner asserted at the hearing that he was present at Purnnima Food store on August 11, 1999 for the purpose of applying for a job, and was merely standing by the side of the counter waiting for the owner to return when the investigators approached him. He attempted to inform them that he was not an employee, but to no avail. Petitioner argues that he was not guilty of the criminal offense and was not employed by or an officer of Purnnima Food Corp. and is therefore not liable for the penalty.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 481(former [1][b]) provides, in pertinent part, as follows:

[T]he commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person . . . . The commissioner of taxation and finance, in his discretion may remit all or part of such penalty.

B. Based on the evidence in the record, petitioner is not liable for the penalty asserted by the Division because he was not in possession or control of the unstamped and Virginia tax-stamped cigarettes found at Purnnima Food store on August 11, 1999.

Petitioner's uncontradicted credible testimony established that he was in the store on August 11, 1999 in search of employment and was mistakenly identified by the Division's investigators as a clerk. The Division offered no proof that petitioner was an employee or officer of Purnnima Food Corp. other than his mere presence at the store and a prior relationship with the owner.

Petitioner's inability to communicate well in the English language and his lack of understanding of the Tax Law might have contributed to the confusion which led to his arrest, incarceration and the issuance of the Notice of Determination herein. However, neither failing constitutes a basis for sustaining the notice.

C. Buttredding this conclusion is the fact that the misdemeanor complaint against petitioner was adjourned in contemplation of dismissal. Although the Division of Taxation contended that such a disposition indicates guilt, by definition there can be no plea of guilty or commencement of a trial for a court to order an adjournment in contemplation of dismissal ("ACOD"). (Criminal Procedure Law § 170.55 [1].)

Further, by law, the granting of an ACOD cannot be deemed to be a conviction or an admission of guilt and, upon final dismissal, the arrest becomes a nullity and the defendant is restored to his status before the arrest. (Criminal Procedural Law § 170.55 [8].)

Therefore, the Division of Taxation knew at the time of the court's disposition in December of 1999 that petitioner had been absolved of any wrongdoing alleged in the misdemeanor complaint it filed. This raised serious doubt about the strength of its case but the Division of Taxation forged ahead and issued a Notice of Determination for the penalty three months later.

The only evidence of the events of August 11, 1999 submitted by the Division were the Tax Enforcement Referral Report, dated August 12, 1999 and the update of said report, dated January 9, 2003. However, for the reasons cited above, these documents do not support a conclusion that petitioner was a person in possession or control of the 45.9 cartons of unstamped or Virginia state-tax stamped cigarettes.

D. The petition of Hanif Bhwiyan is granted and the Notice of Determination, dated March 23, 2000, is canceled.

DATED: Troy, New York  
April 3, 2003

/s/ Joseph W. Pinto, Jr. \_\_\_\_\_  
PRESIDING OFFICER